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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ALCAN FOIL PRODUCTS DIVISION OF ALCAN ALUMINUM CORPORATION - - - - - Petitioner,

versus

UNITED STATES OF AMERICA - - Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, ON BEHALF OF THE CABINET FOR ECONOMIC DEVELOPMENT OF THE COMMONWEALTH OF KENTUCKY, CITY OF LOUISVILLE, KENTUCKY CHAMBER OF COMMERCE, LOUISVILLE AREA CHAMBER OF COMMERCE, ASSOCIATED INDUSTRIES OF KENTUCKY, THE AFL-CIO, THE ALUMINUM BRICK AND GLASS WORKERS INTERNATIONAL UNION, LOCAL 130, THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT #27, LOCAL 681, AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 369, AS AMICI CURIAE

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Amici Curiae submit this memorandum in support of the Petition for Writ of Certiorari filed by Alcan Foil Products Division of Alcan Aluminum Corporation ("Alcan") on January 17, 1990, seeking review of the decision and order of the United States Court of Appeals for the Sixth Circuit in this case. Attorneys for all of the parties have consented to the filing of this brief.[1]

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[1]Consent letters have been filed with the Clerk of the Court.

INTERESTS OF THE AMICI CURIAE

The amici curiae are a group of associations and agencies representing the interests of business and labor throughout Kentucky. They share a common objective of promoting a balance between a healthful environment and a healthy economy, and believe that both assets can best be promoted through state exercise of primary authority for air quality control.

The Kentucky Cabinet for Economic Development is the primary state agency responsible for creating and retaining jobs and investment in Kentucky. Programs administered by the Cabinet are designed to support and promote economic development within the state primarily through attracting new industries to Kentucky and assisting in the development and retention of existing industries. The Louisville Chamber of Commerce represents approximately 2,500 businesses in the Louisville and Jefferson County area, employing over 275,000 Kentuckians. As the largest business association within the community, the Chamber has a long-standing and continuing interest in the economic growth and development of the community. The Kentucky Chamber of Commerce is a broad-based statewide association of over 3,400 businesses. It promotes business interests through legislative lobbying and sponsors various programs to develop community leadership, local economic development, and long-range planning for the business community of Kentucky. Associated Industries of Kentucky is a statewide organization of employers throughout Kentucky in all segments of business. It is dedicated to a better business, tax, and labor climate and provides a wide range of services to its members. All of these associations are directly and daily concerned with

the application of federal laws and standards through the cooperation of federal, state, and local agencies in such a way that industries may enjoy consistent and balanced regulation of their activities. They recognize that a company ordered by a federal agency to conform to one standard and by a local agency to conform to another may well decide that another region of the country would be a better place to conduct business.

The City of Louisville is interested in this litigation not only because it wants to ensure that its business entities are fairly dealt with by the Environmental Protection Agency (EPA), but also because the city itself operates an incinerator and wishes to avoid being confronted with the same undesirable choices that face Petitioner Alcan. The city maintains that the local government is in a far better position than EPA to balance the rights of the employees, industry, and the general public.

The Kentucky AFL-CIO, the International Brotherhood of Electrical Workers, Local Union 369, the International Association of Machinists and Aerospace Workers, District No. 27, Local 681, and the Aluminum, Brick and Glass Workers International Union, Local 130, all represent employees employed by Alcan at its three locations in Louisville, Kentucky. These unions wish to emphasize that the number of manufacturing jobs in many communities has dropped dramatically in the last two decades. In Louisville and Jefferson County the number of well paid manufacturing jobs has fallen from 190,000 in 1974 to under 80,000 currently. The labor unions wish to remind the court that, while EPA procrastinates its review of local regulation revisions, their members and their families face the possibility of financial ruin. Many would not be employable should Alcan be forced to close its plant.

All of the above-described parties have a real and direct interest in maximizing local participation in the development and application of state implementation plans (SIPs) concerning air quality. They maintain that the state, not EPA, is the primary forum for carrying out the give-and-take rulemaking process of developing an emissions program which answers the needs of the community, local industry, and the general public. The amici all recognize that such businesses as Alcan contribute significantly to the economic well-being of Kentucky and elsewhere, through employment, related taxes, and other value-added components, such as secondary employment that services these employees and their families. Jobs and local economy are jeopardized by EPA's refusal to issue timely decisions on SIP revisions and by the threat of significant litigation expenses and penalties borne by companies complying with the locally-enforced revisions, validly promulgated under state and local law. They are concerned that the rule established by the court below fails to penalize EPA adequately for its excessive delays in SIP review and encourages EPA to sue companies as a means of pressuring them to conform to unpromulgated EPA policies. EPA is thus encouraged to take similar action with regard to other industries in the future.

Amici curiae believe that Alcan's Petition for Certiorari should be granted because the case would offer this court a context in which to review the impact of the EPA's delay of SIP review, coupled with concurrent enforcement actions, upon these groups, their members, and the Commonwealth of Kentucky as a whole. The amici have previously demonstrated their interest in this case by participating as amici curiae in the court below.

REASONS FOR GRANTING THE WRIT

This case presents additional aspects of the issues before the Court in *General Motors Corporation* v. *United States of America*, No. 89-369, certiorari granted December 4, 1989. Review of this case in conjunction with the *General Motors* case would aid the Court in its consideration of the various questions involved.

1. The Alcan case dramatically illustrates how EPA's delay in reviewing a SIP revision, concurrent with a lawsuit for penalties, deprives the local agency of its role in air quality control.

Both *General Motors* and this case concern a central issue of nationwide importance: Whether EPA should be allowed to maintain an enforcement action for civil penalties against a company which is in full compliance with current state and local air quality regulations, even though EPA has failed to meet statutorily imposed deadlines for reviewing those regulations for conformity with federal standards. By failing to approve or disapprove the proposed SIP, EPA relegated a valid Kentucky regulation to a state of limbo.

Regulations promulgated pursuant to the Clean Air Act provide that a SIP revision submitted to the EPA must have already been adopted by the state in final form. 40 CFR 51.104(d). At the time of its submission, SIP revision is effective state law, the law with which the industry must comply in order to avoid a local enforcement action by the primary authority. Yet EPA refused to review the SIP revision and pursued a federal enforcement action against Alcan, even though the state air authority emphatically and repeatedly maintained that the Alcan facility was in

full compliance with its law. A valid state regulation was nullified, not by EPA disapproval, but by EPA inaction. The Alcan case would present a fine context in which this Court could examine the propriety of the EPA's usurpation of state role in air quality regulation in such a fashion.

2. The facts of this case forcefully illustrate how EPA's usurpation of the local regulatory authority's role aggrieves not only the company but its employees, other businesses, and the community as a whole, the very public which Congress intended to have a voice through local regulation of air quality.

Amici believe that this case demonstrates, better than *General Motors*, that the consequences of allowing EPA to pursue a company for violation of a state implementation plan which EPA has neglected or refused to approve or disapprove, often for a period of years, are felt far beyond the company boundaries. The consequences to employees and their families, to surrounding providers of services and goods, and to the community economy have not been detailed before this Court and likely will not be in the *General Motors* case alone.

Congress assigned the primary authority for air quality regulation to the states, relegating EPA to a secondary role of oversight to assure that national standards would be maintained. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975). The state regulatory agency, far more knowledgeable of local conditions and local needs, far more accessible by the general public, and far more capable of flexibility than a national superagency, is in a better position to apply particular standards to specific operations within its own district than is EPA. As recognized by this Court:

> Perhaps the most important forum for consideration of claims of ecomonic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the state may select whatever mix of control devices it desires . . . and industries with particular economic and technological problems may seek special treatment in the plan itself.

Union Electric Co. v. *EPA*, 427 U.S. 246, 266 (1976). Congress thus recognized that the only workable forum in which local industry and labor such as amici's members can receive genuine consideration is the state or local agency. Assuming their specific concern can be accommodated without violating national air quality standards, revision of the SIP is the appropriate response. If EPA refuses to approve or disapprove the new SIP for years at a time, however, and continues to enforce the old SIP, EPA undercuts the local agency's attempts to balance economic and environmental considerations. The federal government thus entirely cuts out of the process the state, the individual source, and persons such as amici's members.

The Alcan case clearly demonstrates how interested parties were left out of the process. Alcan worked with the local agency to develop a bubble plan applicable to its facility, following a hearing at which the general public had an opportunity to comment. Unable to obtain a decision from EPA from 1982 until 1986 on either of two SIP revisions, the local agency advised Alcan to work out its differences with EPA directly. EPA then met only with Alcan. Neither the local authority nor the general public had the opportunity to participate further, except to comment on the proposed disapproval eventually published in the *Federal Register*. 53 Fed. Reg. 40745 (1988). This

total abandonment of the concept envisioned by Congress of a state-federal partnership, this exclusion of the general public from the decision-making process, makes the Alcan case a compelling one for review of the far-reaching consequences of allowing EPA to "pocket veto" a SIP revision and yet maintain a suit against the company endorsing the revision.

Under the circumstances of the Alcan case, if the EPA is allowed to pursue an enforcement action while holding a SIP revision hostage, the company is forced to decide whether the costs of litigation and threatened penalties, along with the possibility that its SIP revision will be rejected, dictate closure of a marginal facility. That dilemma is more clearly illustrated in the Alcan case than in *General Motors.* While General Motors wrestled with the issue of which of several options might be more economically feasible, Alcan had to decide whether its operations should continue in Kentucky at all. Alcan's quandary has been amici's quandary. The manufacturing jobs at the Alcan plant would be sorely missed, not only by Alcan's employees, but by other businesses and employees whose livelihood would be jeopardized by the demise of Alcan.

For a facility such as Alcan, engaged in miscellaneous metal work in Kentucky, for every $1,000,000 of the company's gross sales lost due to the closing of the plant, the Department of Commerce would predict a drop of nearly $600,000 in wages paid to employees in the state. Bureau of Economic Analysis, Department of Commerce, Regional Input-Output Modeling System II for Kentucky (1988) (earnings multiplier). Similarly, for every such $1,000,000 decrease in sales, a decrease of over thirty jobs would be expected in the state. *Id.* (employment multiplier). Ken-

tucky and amici's members can ill afford such damage to their economy.

3. There is a direct conflict among the circuit courts which have addressed the issues of this case.

Four circuit courts have examined issues pertinent to this case. *United States* v. *Alcan Foil Products*, 889 F. 2d 1513 (6th Cir. 1989); *United States* v. *General Motors Corp.*, 876 F. 2d 1060 (1st Cir. 1989); *American Cyanamid Co.* v. *EPA*, 810 F. 2d 493 (5th Cir. 1987); and *Duquesne Light Co.* v. *EPA*, 698 F. 2d 456 (D.C. Cir. 1983). The Sixth Circuit attempted to fashion a middle ground which it believed would provide an incentive for EPA to review SIP revisions expeditiously but would also protect the general public. Its solution was to allow EPA to maintain its enforcement action even as it held the SIP revision hostage, but to allow the trial court to adjust the penalty by balancing the reasonableness of EPA's delay against any prejudice to the source, so long as the source can show that it is in compliance with the revised SIP.

While the Sixth Circuit's attempt to balance the equities is admirable, it misses the mark. First, the court assumed that the "public" would be best served by allowing EPA to maintain an enforcement action before deciding on the SIP revision. Amici, members of the public, believe that SIP revisions which are plainly unsound from an environmental standpoint can be expeditiously rejected. If the revision is so inoffensive that it takes EPA more than two years of policy development to find a reason to reject it, as happened in the Alcan matter, little is to be gained by a rush to enforce the old SIP when the source is complying with the new SIP. EPA needs incentive to decide its general

policy before attacking an individual facility for violation of what may become policy someday.

Second, amici assert that, even if it is aware of the possibility that penalties will be reduced due to equitable considerations, a marginal industrial facility may rationally decide that the gamble is just too great and that the costs of litigation may be too much to bear. If the industry chooses to shut down its operations or to move them, its employees, surrounding providers, and the community as a whole pay the price. Other industries face the spectre of similar treatment should they attempt to comply with revised SIPs duly promulgated under state and local law but not yet approved by EPA. Amici submit that a fairer, more objective approach would be to follow the holding of the Fifth Circuit in *American Cyanamid*, 810 F. 2d at 501. That is, EPA should be prohibited from commencing enforcement proceedings until it rejects a proposed revision.

CONCLUSION

Amici submit that a review of this case in conjunction with *General Motors* will provide this Court with a greater understanding of the potential consequences of allowing EPA to maintain an action for penalties against a company complying with a validly promulgated SIP revision which EPA fails to review as required by law. For the reasons stated, amici respectfully pray that Alcan's petition for a writ of certiorari be granted.

Respectfully submitted,

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